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CASE CLIPS

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CRIMINAL LAW ISSUES

CRAWFORD v. STATE, No. 10S00-0007-CR-456, ___ N.E.2d ___ (Ind. Sept. 26, 2001).
BOEHM, J.

Crawford contends that his right to due process and to a jury trial was violated when his sentence for attempted murder was enhanced by five years based on the trial court's finding beyond a reasonable doubt that he had used a firearm in the commission of this offense. Crawford bases his argument on Apprendi v. New Jersey, 530 U.S. 466, 491-97 (2000), in which the United States Supreme Court held that the Sixth and Fourteenth Amendments of the United States Constitution are violated where a defendant's sentence is enhanced beyond the statutory range based on a fact not found beyond a reasonable doubt by a jury. We need not address this issue because the statute allowing an additional sentence for use of a firearm by its terms is inapplicable to this case.

Indiana Code section 35-50-2-11 allows the trial court to enhance a sentence by five years if the defendant used a firearm in the commission of "an offense." An offense is defined as "a felony under IC 35-42 that resulted in death or serious bodily injury." [Footnote omitted.] In this case, the State charged that Crawford "did knowingly or intentionally use a firearm in the commission of said Attempted Murder." No part of Chapter 42 defines the crime of attempted murder. Because attempted murder is not "an offense" as the statute defines that term, an enhancement may not be attached to it.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

LEWIS v. STATE, No. 52A02-0008-CR-503, ___ N.E.2d ___ (Ind. Ct. App. Sept. 10, 2001).
HOFFMAN, J., Senior Judge

[T]he trial court sentenced Defendant to the Department of Correction for a term of two years for each count, with each count to be served consecutively to the others. The trial court further ordered that Defendant serve the first two years of her sentence on probation, on home detention, due to the fact that Defendant had recently given birth to a child. The trial court ordered that following the period of home detention that the next two years be served as executed time. The trial court then placed Defendant on probation for the remaining twelve years. . . .

On May 23, 2000, prior to the completion of her two-year period of home detention, Defendant filed a Motion for Modification of Sentence under Ind. Code §35-38-1-17(a). The trial court set the matter for hearing. At the beginning of the hearing, the State objected to holding the hearing on the motion because more than three hundred sixty-five days had elapsed between the entry of the sentencing order and the beginning of the home detention, and the filing of the motion. . . . [T]he trial court found that the State's consent

and approval was required because more than three hundred sixty-five days had passed since the date of the sentencing order and commencement of Defendant's home detention.

. . . .

Since Defendant could not earn credit for time served while on home detention as a condition of probation, she did not begin serving her sentence while on home detention as a condition of probation. Defendant began serving her sentence for purposes of Ind. Code §35-38-1-17 when she began serving the executed portion of her sentence. Defendant should be allowed to pursue the modification of her sentence without the prosecutor's consent. The trial court has jurisdiction to hold a hearing on Defendant's motion for modification of sentence.

. . . .

SULLIVAN and MATHIAS, JJ. concurred.

LOUALLEN v. STATE, 58A05-0102-CR-53, ___ N.E.2d ___ (Ind. Ct. App. Sept. 24, 2001).
RATLIFF, Senior Judge

Defendant-Appellant Randy Louallen (Louallen) appeals his conviction of child molesting, a Class C felony. Ind. Code § 35-42-4-3.

. . . .

We turn now to the instruction in the instant case. The trial court instructed the jury as follows:

> The crime of child molesting is defined by statute as follows:
>
> A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony.
>
> To convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:
>
> The Defendant
> 1**. knowingly or intentionally**
> (a) performed any fondling or touching of [V.K.]
> (b) with the intent to arouse or satisfy the sexual desires of Randy S. Louallen
> 2. when [V.K.] was a child under fourteen (14) years of age.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Child Molesting, a Class C felony.

(R. 77) (emphasis added). This instruction given at Louallen's trial substantially tracks the Indiana Pattern Criminal Jury Instruction for child molesting, *See* 1 Indiana Pattern Jury Instructions (Criminal) 3.33 (Supp. 1999), as well as the child molesting statute. * . . .

Although the child molesting statute is silent as to a *mens rea* requirement, criminal intent is an element of the offense. *State v. J.D.*, 701 N.E.2d 908, 909 (Ind. Ct. App. 1998), *trans. denied*; *Warren* [*v. State*], 701 N.E.2d [902 Ind. Ct. App. 1998), *trans. denied*] at 905. Our pattern jury instructions use "knowingly or intentionally" as the *mens rea*; however, our case law appears to have adopted only the *mens rea* of "intentionally." This adoption seems to be based, at least in part, on the wording of the child molesting statute which states "**with intent to** arouse or satisfy." (emphasis added). Moreover, Ind. Code § 35-41-2-2(d) states that: "[u]nless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to

every material element of the prohibited conduct." Thus, the "intentional" requirement of the child molesting statute is applicable to the fondling or touching element, as well as to the element of arousing or satisfying sexual desires. [Citations omitted.] We note that, until now, this Court has never specifically held that the *mens rea* of child molesting does not include "knowingly." Today, we hold that the *mens rea* for the offense of child molesting is "intentionally." Based upon this holding, we will evaluate Louallen's claim.

. . . .

ROBB, J., concurred.
SULLIVAN, J., filed a separate written opinion in which he concurred.

STANLEY v. STATE, No. 18A05-0103-CR-112, ___ N.E.2d ___ (Ind. Ct. App. Sept. 26, 2001).

MATTINGLY-MAY, J.

[W]e consider whether the trial court abused its discretion in entering a judgment against Stanley in the amount of $6,000.00 for public defender fees. Ind. Code § 33-9-11.5-6(a)(2) provides statutory authority for a trial court to order a defendant to reimburse "[c]osts incurred by the county as a result of court appointed legal services rendered to the person" after a finding by the court that the defendant has the ability to pay those costs. That section also provides that "[t]he sum of: (1) the fee collected under I.C. 35-33-7-6; (2) any amount assessed by the court under this section; and (3) any amount ordered to be paid under I.C. 33-19-2-3; may not exceed the cost of defense services rendered to the person." Ind. Code § 33-9-11.5-6(d).

. . . .

We must assume there was a finding at the initial hearing that Stanley was entitled to a public defender due to his indigency. As noted in Ind. Code § 35-33-7-6(d), "[t]he court may review the finding of indigency at any time during the proceedings." Therefore, the trial court properly reviewed Stanley's financial situation at the sentencing hearing. Stanley testified that at the time of preparation of the presentence report, he was working and earning three or four hundred dollars per week; he also testified that he would have a job available to him through his father's company upon his release from incarceration. (Tr. at 24-25.) Thus, the trial court stated that "there were times right up to the time . . . sentencing was first scheduled . . . where this Defendant . . . was earning Three to Four Hundred Dollars a week so that he's certainly once he is back in society capable of earning monies." *Id.* at 35. This oral finding that at a point during the proceedings Stanley was no longer indigent justifies the subsequent conclusion by the trial court that Stanley was able to pay public defender fees upon his release from incarceration. [Footnote omitted.] Thus, the award in this case may exceed the $100.00 limit on attorney fees to be charged an indigent person for representation as described in Ind. Code §§ 35-33-7-6(c).

However, the record contains no evidence or findings regarding the actual cost of defense services rendered to Stanley. [Footnote omitted.] Without such findings, we are unable to determine how the trial court arrived at the $6,000.00 figure. [Footnote omitted.] We also note that the record contains no findings or calculations regarding how the trial court arrived at its conclusion that Stanley would be able to reimburse the county in that amount given his average weekly salary of $300.00 to $400.00. Therefore, we find the trial court abused its discretion when entering this judgment against Stanley without appropriate findings, and on this issue we reverse and remand for proceedings consistent with this opinion.

. . . .

SHARPNACK, C. J., and KIRSCH, J., concurred.

CIVIL LAW ISSUES

OWENS CORNING FIBERGLASS CORP. v. COBB, No. 49S04-0001-CV-33, (Ind. Sept. 10, 2001).

SULLIVAN, J.

The Products Liability Act limits a defendant's liability according to its proportion of fault. Ind. Code § 34-20-7-1. Because of this, there is an incentive for defendants to include nonparties who will share in a proportion of fault.

. . . .

The deadline for naming a nonparty defendant depends upon when the defendant receives notice of the availability of a certain nonparty to add. Indiana Code § 34-4-33-10(c) states:

> A nonparty defense that is known by the defendant when [the defendant] files [the defendant's] first answer shall be pleaded as a part of the first answer. A defendant who gains actual knowledge of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness. However, if the defendant was served with a complaint and summons more than one hundred fifty (150) days before the expiration of the limitation of action applicable to the claimant's claim against the nonparty, the defendant shall plead any nonparty defense not later than forty-five (45) days before the expiration of that limitation of action. The trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with: (1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and (2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim. □
>
> □

Owens Corning knew of all the companies that it intended to add as nonparties well before it named them. On November 1, 1996, Cobb filed a verified disclosure statement that listed the name or type of asbestos-containing product or item to which Cobb was exposed, as well as all of Cobb's former employers that he worked for at the time of each exposure. The list contained all of the parties that Owens Corning subsequently sought to add as nonparty defendants. It appears therefore, that Owens Corning had notice of all these entities as early as November 1, 1996, nearly a year prior to naming them in its October 15, 1997, motion for leave to amend its answer.

Although Owens Corning knew of all the entities early on, many of them (including Sid Harvey) were named defendants from the outset. We will return to this category of entities in a moment. The balance of the entities, however, were never named as defendants and were therefore available for Owens Corning to add as nonparties at least as early as November 1, 1996. According to § 34-4-33-10(c), these parties should have been added with "reasonable promptness" after November 1, 1996. [Footnote omitted.] It therefore appears – although we do not decide – that the trial court's grant of summary judgment is sustainable on this legal theory with respect to nonparty affirmative defenses relating to these entities. [Citation omitted.]

The other parties that Owens Corning attempted to add as nonparties had been named as defendants at the outset of the litigation and subsequently settled with Cobb or were otherwise dismissed from the action. There were two obvious consequences of the fact that these parties were named defendants. First, since they were named defendants, they could not be added as nonparties. Second, they were known to the plaintiff.

The language of Indiana Code § 34-4-33-10(c) (now Indiana Code § 34-51-2-16) states that, "[a] defendant who gains actual knowledge of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness." (emphasis added). Because the former party defendants that Owens Corning sought to add as nonparties could only have been added as nonparties after they were dismissed as parties, we hold that for purposes of the statute, Owens Corning acquired actual knowledge of a nonparty

affirmative defense relating to a particular entity only when it received notice that the entity had been dismissed from the action. . . .

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

COMM'R, INDIANA DEP'T OF ENVTL. MGMT. v. RLG, INC., No. 27S02-0102-CV-101, ___ N.E.2d ___ (Ind. Sept. 24, 2001).

BOEHM, J.

We hold that under some circumstances, including those here, an individual associated with a corporation may be personally liable under the responsible corporate officer doctrine for that corporation's violations of the Indiana Environmental Management Act, whether or not the traditional doctrine of piercing the corporate veil would produce personal liability.

. . . .

Under Indiana Code section 13-30-6-4, "A responsible corporate officer may be prosecuted for a violation of section 1, 2, or 3 of this chapter in accordance with IC 35-41-2-4." The criminal code section to which this refers is the general "aiding and abetting" statute, which provides that one who aids a crime commits that crime. Under these provisions, aiding or directing a crime, if done "intentionally or knowingly" is sufficient to support criminal responsibility under Indiana Code sections 13-30-6-4 and 35-41-2-4. [Citation omitted.] The landfill violations would have constituted a violation of Indiana Code section 13-30-6-1. Statutory civil liability is more expansive than criminal liability. Unlike the criminal liability provision in the environmental management laws, the provision imposing civil liability has no "mens rea" requirement of knowledge or willfulness. Indiana Code section 13-30-4-1 imposes civil liability on "a person who violates" environmental management laws. A "person," for purposes of environmental management laws, includes "an individual, a partnership, a copartnership, a firm, a company, a corporation . . . ." Ind. Code § 13-11-2-158 (1998). Both general legal principles and the language of the statute support the conclusion that an individual acting for a corporation participating in a violation of a statute listed in Indiana Code section 13-30-4-1 may be individually liable for civil penalties under that section, and, if acting with the requisite mens rea, may be criminally responsible for violations of Indiana Code sections 13-30-6-1 through 3. As elaborated in Part II, Roseman is individually liable under all three of the theories discussed in this section.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

STATE ex rel. INDIANA DEPARTMENT OF REVENUE v. DEATON, No. 73S01-0104-CV-207, ___ N.E.2d ___ (Ind. Sept. 26, 2001).

BOEHM, J.

We hold that the Indiana Department of Revenue may collect a tax judgment lien through proceedings supplemental in a court in any county where the taxpayer owns property without first filing suit and obtaining a judgment foreclosing the lien.

. . . .

The Deatons argued, and the majority of the Court of Appeals held, that the Department must "domesticate" its final determination by filing suit and obtaining a judgment foreclosing its lien in an Indiana court of general jurisdiction before it may begin proceedings supplemental. Deaton, 738 N.E.2d at 700. . . .

. . . .

[W]e hold that, unless and until it is appealed to the Tax Court, a final determination of the Department is the equivalent of a judgment, and when the tax warrant that embodies that final determination is recorded as a judgment lien in the judgment record of a county court, the warrant becomes a judgment of that court, which thereby acquires jurisdiction for

the limited purpose of enforcing the judgment. The judgment may be enforced as any other judgment of the court, including by means of proceedings supplemental. Accordingly, the Deatons' motion to dismiss should have been denied, and the Shelby Superior Court should have allowed the Department to commence proceedings supplemental. . . .

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

FOBAR v. VONDERAHE, No. 34A05-0101-CV-2, ___ N.E.2d ___ (Ind. Ct. App. Sept. 26, 2001).

BARNES, J.

When reviewing an award of attorney fees in connection with a dissolution decree, we reverse the trial court only for an abuse of discretion. [Citation omitted.] . . . Apart from the purpose of equalizing the parties' respective positions, however, misconduct that directly results in additional litigation expenses may also properly be taken into account in the trial court's decision to award attorney fees in dissolution proceedings. [Citation omitted.] The trial court's findings indicate that it awarded fees based upon Fobar's alleged litigation misconduct, not out of concern for equalizing the parties by ensuring that both would have access to an attorney's services, and so we will examine whether the trial court's finding that "the conduct of Wife during the course of this litigation, particularly during discovery and trial" supports the attorney fees award on that basis. [Citation to Record omitted.]

Vonderahe's brief contains no argument to support the trial court's implicit finding that Fobar engaged in misconduct during the discovery phase of the litigation, and so he has essentially conceded that she did not engage in misconduct at that time. See Former Ind.Appellate Rule 8.3(A)(7). We are persuaded by Fobar's argument that she did not engage in discovery misconduct to the extent she simply insisted that no discovery take place until Vonderahe filed a financial disclosure form, which filing was apparently a prerequisite to discovery taking place in Howard County dissolution actions pursuant to Local Rule 16(B)(2).

We believe the remainder of the finding regarding attorney fees presently to be insufficient. Although it is generally true that a court need not list specific reasons for awarding attorney fees in a dissolution action, [citation omitted], that general rule should not be applicable when one party has specifically requested findings and conclusions under Trial Rule 52. . . . We do not believe the sole reference to Fobar's "conduct" during the course of litigation is sufficiently complete to support the attorney fees award. We thus remand to the trial court for reconsideration of this issue and, if appropriate after such reconsideration, the entry of more complete findings that specifically identify instances of "misconduct" that directly resulted in increased litigation expense to Vonderahe.

. . . .

DARDEN and NAJAM, JJ, concurred.

REED SIGN SERV., INC. v. REID, No. 34A02-0103-CV-132, ___ N.E.2d ___ (Ind. Ct. App. Sept. 26, 2001).

ROBB, J.

Reed Sign primarily argues that as no summons was served along with the TRO, the court did not have personal jurisdiction over it. Reed Sign notes Trial Rule 4(A), which provides that "[t]he court acquires jurisdiction over a party . . . who . . . commences or joins in the action, *is served with summons* or enters an appearance, or who is subjected to the power of the court under any other law." (Emphasis supplied.) Thus, Reed Sign argues its actual knowledge of the suit was not sufficient for a finding of jurisdiction without Lynn Reid also attempting service of the summons.

Reed Sign also makes numerous arguments that the attempts at service Lynn Reid did make were defective, and thus insufficient to confer jurisdiction on the trial court. First,

Reed Sign argues the service upon its attorney, Dan J. May, was an invalid attempt at service upon a party's attorney under Trial Rule 5(B), as May was not counsel of record for Reed Sign at the time he was served on February 25, 2000. Next, Reed Sign argues the service upon Jay Reed, a corporate officer, at his personal residence was not valid service under Trial Rule 4.6, as the rule generally does not allow for service at the person's residence. Reed Sign argues that the summons left at its business address for Jay Reed was insufficient service under Trial Rule 4.6(C), as it did not contain an affidavit as described in Trial Rule 4.6(C). Finally, Reed Sign argues that Lynn Reid's leaving a copy of the TRO at its office did not satisfy Trial Rule 4.1(B), which requires that the summons be mailed as a follow-up after service.

We do not find the failure to serve a summons with the TRO to be fatal to Lynn Reid's attempts at service upon Reed Sign. Nor do we find it necessary to consider each of Reed Sign's individual arguments regarding improper service under Trial Rules 4 through 5. Rather, we find that the trial court did have jurisdiction over Reed Sign through the issuance and service of the TRO and through Reed Sign's actual knowledge of the order.

. . . .

There is a distinction for a defendant between the consequences of not having actual notice of a TRO and not having notice of another type of suit, such as a civil action for monetary damages or a contempt action. A plaintiff has no remedy against a defendant who violates a TRO without actual notice of that order. However, a plaintiff may be awarded a default judgment that is binding against a defendant who did not have actual notice of the suit. Thus, the limited, temporary nature of the relief to a plaintiff and of the harm to a defendant in a TRO proceeding mandates a slightly more flexible approach to the service rules when actual notice is accomplished. Furthermore, Trial Rule 65(B) provides that no TRO shall be in effect more than ten days without additional procedural safeguards. Thus, it may be difficult for a plaintiff to strictly comply with all service requirements before the order expires.

. . . .

BAKER and FRIEDLANDER, JJ., concurred.

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